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**)ALSN<sub>o</sub>: 11598**

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8. Complainant began working for Respondent as a waitress in mid-September of 1999.
9. Complainant performed her job duties in a manner consistent with Respondent's standards.
10. Complainant worked four days a week from 5:00 p.m. until midnight; after which she would participate in cleaning the restaurant and then leave around 12:30 a.m. or 1:00 a.m.
11. Abel would arrive at the restaurant approximately 10:00 p.m. or 10:30 p.m. each day Complainant worked.
12. Abel would drive Complainant home at the end of her shift almost every day.
13. The ride to Complainant's home from the restaurant is approximately 10 minutes.
14. During these rides home, Abel and Complainant would be alone many times.
15. Martin Rameriz (Martin) is the brother of Abel.
16. Martin worked in the kitchen every day at the restaurant.
17. Martin's duties were to chop vegetables and assist in the kitchen.
18. Martin did not cook, wash dishes, bring food to tables, nor take orders.
19. Martin would arrive to the restaurant between 6:00 p.m. and 8:00 p.m. each day.
20. Ezekiel Reyes (Ezekiel) worked for Respondent as a full time "cook."
21. Ezekiel worked from 2:00 p.m. until 10:00 p.m.
22. Ezekiel would already have arrived at the restaurant for work when Complainant arrived for work.
23. Between 5:00 and 10:00 p.m., before Abel arrived to work, no one directed Complainant as to her job duties because Complainant knew her job duties and would perform them without direction from anyone.
24. Neither Martin nor Ezekiel ever gave Complainant orders as to her job duties.
25. Since November 25, 1999 until February 15, 2000, Martin and Ezekiel directed sexual comments and conduct toward Complainant and Complainant rejected them.
26. When Complainant first began working for Respondent, every night Martin would ask Complainant to go out with him.
27. Martin would ask Complainant to marry him, would ask Complainant to allow him to take her to live with him in Mexico, and would tell Complainant that he would not allow her to work so that he could give her everything.
28. Martin would tell Complainant that he would do good things to her if they would go out.
29. Complainant would feel uncomfortable by Martin's comments and would reject Martin's offers.
30. From November 25, 1999 until mid-February, 2000, Ezekiel asked Complainant to go out with him many times.
31. Ezekiel would offer to buy Complainant clothes and things and ask her out to a restaurant.
32. Ezekiel would say in the Spanish language that Complainant's body is really good, that her "ass" is really good, that her legs are really good.
33. Complainant felt offended by Ezekiel's comments.
34. Complainant said "no" to Ezekiel's requests.
35. Ezekiel and Martin would say, in Complainant's presence, that women had to sleep with men, that women had to "give it" to men, and that it would cause cancer if women would not sleep with men.

36. Ezekiel would touch Complainant's "ass" when she would pass by him on her way to the bathroom.
37. Ezekiel would throw Complainant against the dishwashing area and would forcibly kiss her; Complainant would push him away and get out of the kitchen area.
38. Ezekiel would make little balls out of paper and throw them down Complainant's blouse.
39. Complainant did not report Ezekiel's conduct to Abel until Thursday, February 17, 2000. (Although the record reflects numerous entries that Complainant first reported the harassing conduct to Abel on February 15, 2000, Complainant and Abel both testified that Complainant first reported the unwanted conduct to Abel on a Thursday, her last day of work. Referral to my calendar shows that the Thursday of that week was February 17th – not the 15<sup>th</sup> ; therefore, I am taking judicial notice that all references to February 15, 2000 in the record are actually references to Thursday, February 17, 2000.)
40. Complainant first talked to Abel about the unwelcome conduct Thursday, February 17, 2000 while Abel was driving her home in his car.
41. Abel then asked Complainant if she would confront Ezekiel and Martin with the accusations and she refused.
42. Abel indicated to Complainant he would speak to Martin and Ezekiel about the accusations.
43. Abel confronted Martin and Ezekiel the next day about Complainant's sexual accusations against them.
44. Martin and Ezekiel denied Complainant's sexual accusations.
45. Complainant telephoned Abel at the restaurant on Sunday, three days after she had informed him of Martin's and Ezekiel's conduct.
46. Complainant telephoned Abel to determine what "solution" he had developed in response to her accusations of sexual harassment.
47. Abel told Complainant that he was too busy, could not talk at that time and asked her to call him back later.
48. Complainant did not telephone Abel back.
49. Complainant expected that Abel should have telephoned her and asked her to come to work after she had reported Martin and Ezekiel.
50. Complainant did not come back to work after February 17, 2000.

#### CONCLUSIONS OF LAW

1. The Illinois Human Rights Commission has jurisdiction over the parties and subject matter of this action.
2. Martin and Ezekiel were employees for Respondent.
3. Martin and Ezekiel were not supervisors or management personnel for Respondent.
4. Respondent took prompt, appropriate investigatory action of Complainant's accusations.
5. Respondent did not retaliate against Complainant by terminating her employment after she reported sexually harassing conduct directed toward her by Martin and Ezekiel.

## DISCUSSION

In mid-September of 1999, Abel hired Complainant as a waitress to work each week from Monday through Thursday, 5:00 p.m. until midnight. Abel is the sole owner of Taqueria Mexico, a restaurant that serves Mexican food. Complainant worked four days a week, from 5:00 p.m. until midnight, after which she would participate in cleaning the restaurant and then leave around 12:30 a.m. or 1:00 a.m. Complainant performed her job duties in a manner consistent with Respondent's standards.

Abel would typically not be at the restaurant when Complainant arrived for work. Abel would arrive at the restaurant approximately 10:00 p.m. or 10:30 p.m. each day that Complainant worked and stay until closing. After closing the restaurant, Abel would drive Complainant home almost every night. On the 10- minute ride to Complainant's home from the restaurant, Abel and Complainant would be alone many times.

Martin Rameriz (Martin), Abel's brother, worked in the restaurant's kitchen every day, arriving to the restaurant between 6:00 p.m. and 8:00 p.m. Martin's duties were to chop vegetables and assist in the kitchen. Martin did not cook, wash dishes, bring food to tables, nor take orders. Martin also ate meals at the restaurant every day. Although Martin performed regular job duties at the restaurant, Abel did not consider his brother an "employee" and did not pay his brother any monetary compensation.

Ezekiel Reyes (Ezekiel) worked for Respondent as a full time "cook." Ezekiel arrived to the restaurant at 2:00 p.m. and worked until 10:00 p.m. Ezekiel would already have arrived at the restaurant for work when Complainant arrived for work.

Neither Martin nor Ezekiel ever gave Complainant orders as to her job duties. Between 5:00 p.m. and 10:00 p.m., before Abel arrived to work, no one directed Complainant as to her job duties.

On February 17, 2000 -- a Thursday and Complainant's last day of work for the week -- Abel was driving Complainant home after her work day when Complainant first talked to Abel about unwelcome sexual conduct being directed toward her by Ezekiel and Martin. Abel asked if she would meet with him at the restaurant to confront Ezekiel and Martin with the accusations and she refused. Abel then told Complainant he would speak to Martin and Ezekiel about the accusations. Abel confronted Martin and Ezekiel the next day about Complainant's sexual accusations; however, Martin and Ezekiel denied Complainant's sexual accusations.

On the following Sunday, a day before her next scheduled day of work, Complainant telephoned Abel while Abel was working at the restaurant. Abel told Complainant he was too busy to talk to her at that time and asked her to call him back. Complainant did not call Abel back and did not return to work again.

### Complainant's sexual harassment claim

Complainant submitted credible testimony of the workplace atmosphere and the sexual conduct she was subject to on a daily basis. When Complainant first began working for Respondent, Martin would ask Complainant to go out with him every night. Martin would ask Complainant to marry him, would ask Complainant to allow him to take her to live with him in Mexico and would tell Complainant that he would not allow her to work so that he could give her everything. Complainant felt uncomfortable with Martin's comments and rejected Martin's offers.

Ezekiel also would ask Complainant to go out with him many times. Ezekiel would offer to buy Complainant clothes and other things and ask her to accompany him to restaurants. Ezekiel would say in the Spanish language that Complainant's body is really good, that her "ass" is really good and that her legs are really good. Ezekiel would touch Complainant's "ass" when she would pass by him on her way to the bathroom and he would throw Complainant against the dishwashing area and forcibly kiss her. Ezekiel would make little balls out of paper and throw them down Complainant's blouse. Complainant's response would be to push him away and get out of the kitchen area. Complainant felt offended by Ezekiel's comments and would say "no" to Ezekiel's advances.

Complainant's testimony was detailed and explicit as to the sexual conduct directed to her by Martin and Ezekiel on an almost daily basis. This conduct offended Complainant and Complainant repeatedly rejected the conduct as unwelcome. Complainant was subjected to sexually harassing conduct by Martin and Ezekiel in the workplace.

### Are Martin or Ezekiel supervisory or management employees?

To determine Respondent's level of liability as to the sexual harassment perpetrated upon Complainant by Martin and Ezekiel, the next inquiry is to determine whether the perpetrators of the sexually harassing conduct were supervisory or management employees.

According to Section 2-102(D) of the Act, an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures, 775 ILCS 5/2-102(D); however, there is no safe harbor for the employer where managerial and supervisory employees commit sexual harassment because managerial and supervisory employees act on behalf of the employer and, therefore, there is a certain identity of employer and supervisory/managerial employees which means that the employer necessarily has notice of sexual harassment committed by these employees. **Cunningham and Wal-Mart Stores, Inc.** \_\_ Ill. HRC Rep. \_\_, (1992CF0496, April 16, 1998).

The record supports that neither Martin nor Ezekiel were supervisory or management employees of Respondent. Complainant argues that, because Martin was Abel's brother, he was in an authority position over Complainant and therefore played a supervisory or management role. The record does not support this theory. There was no evidence presented at hearing to support that Martin, although he was Complainant's brother, had a position of authority over Complainant to direct her or to order her in her job duties or to terminate or discipline her. Complainant testified that during her 5:00 p.m. until midnight work shift, when she typically would work alone with Martin and Ezekiel, she took orders from no one until owner Abel arrived to the restaurant at 10:00 p.m. The essence of supervisory status is the authority to affect the terms and conditions of an employee's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer or discipline an employee. **Parkins v. Civil Contractors of Illinois**, 163 F.3d 1027, 1034; 78 Fair Empl. Prac. Cas. (BNA) 1329, 1334 (7<sup>th</sup> Cir. 1998). A "supervisor," for purposes of holding Respondent liable, is someone at the decision-making level of a company or organization. **Cunningham and Wal-Mart and Webb**, \_\_ Ill. HRC Rep. \_\_ (1990SN0336, 1990SF0335, April 17, 1998).

Neither Martin nor Ezekiel possessed such authority to make decisions for Respondent and there was no evidence presented to support such a conclusion. Martin's job duties were to cut vegetables and assist in the kitchen and Ezekiel's job duties were as cook. Complainant took no direction or orders from either Martin or Ezekiel. Complainant's sole argument to support her contention that Martin was in a management or supervisory capacity is that, because Martin was Abel's brother and Abel expected his brother to help out in the kitchen until he could arrive at 10:00 p.m., she felt that Abel would not take steps to correct Martin's conduct. This reasoning fails to support any reasonable argument that Martin had any authority to make employment decisions to affect the terms and conditions of Complainant's employment. As to Ezekiel, Complainant makes no argument that Ezekiel possessed any decision-making authority. The record supports that neither Martin nor Ezekiel were supervisory or management employees.

Did Respondent have knowledge of the alleged sexual harassment and fail to take prompt, appropriate steps?

Since the harassers were not supervisory or management employees, the next inquiry is whether Respondent was aware of the sexual harassing conduct by Martin and Ezekiel. Employers are liable for the sexual harassment of other employees only if the employer is aware of the sexual harassment and fails to take reasonable corrective measures. **Bundy and Illinois Department of Human Rights**, \_\_ Ill. HRC Rep. \_\_, (Charge No 1995SF0310 June 27, 1997). Respondent cannot be held liable for the harassing actions of Martin and Ezekiel prior to receiving knowledge of such actions. **Vega and Turano**, \_\_ Ill. HRC Rep. \_\_, (1999CF1617, July 23, 2002. ). In **Fritz and State of Illinois Department of Corrections**, \_\_ Ill HRC Rep. \_\_, (1987SF0543, October 17, 1995), the Commission agreed with the Seventh Circuit analysis in **Carr v. Allison Gas Turbine Division, General Motors Corp**, 32 F.3d 1007, (7<sup>th</sup> Cir. 1994) for the proposition that, in co-worker upon co-worker sexual harassment, the principal question is whether

management knew or should have known about the sexual harassment yet failed to take appropriate remedial or investigatory action.

There was no evidence presented that Abel knew or should have been aware of the sexual conduct directed toward Complainant. Complainant and Abel both credibly testified that neither Martin nor Ezekiel would make unwanted advances toward her when Abel was present at the restaurant. It is undisputed that Abel drove Complainant home almost every night, at which time Complainant would be alone with him with an obvious opportunity to report Ezekiel's and Martin's conduct. Still, Complainant did not utilize this time to make Abel aware of Martin's or Ezekiel's conduct until February 17, 2000, the last day Complainant came to work. Further, although Complainant argues that Martin's familial status with Abel prevented her from reporting Martin's conduct, Complainant does not explain why she failed to report Ezekiel, who shared no such familial relationship with Abel.

After being informed of the unwelcome conduct, Abel asked Complainant if she would come along with him to confront the harassers and Complainant refused. Abel then conducted an investigation by confronting Martin and Ezekiel with Complainant's accusations and each denied the accusations. Once Abel was made aware of the unwelcome conduct, he took prompt, appropriate initial investigatory steps; however, because of Complainant's refusal to confront the harassers and because of her failure to return to work and, in the face of Martin's and Ezekiel's denials, there was no opportunity for Abel to complete his investigation and take any further steps.

Respondent's efforts were both timely and reasonably likely to uncover the facts underlying Complainant's complaint. Respondent cannot be held liable where he took prompt, appropriate investigatory steps in response to Complainant's allegations; therefore, Complainant's claim of sexual harassment fails. **Foster v. Township of Hillside**, 780 F. Supp. 1026 (DCNJ 1992), cited by the Commission in **Fritz, supra**.

### Retaliation

The burden shifting format set forth in **McDonnell Douglas Corp. v. Green**, 411 U.S. 792, 93 S. CT. 1817 (1973) is applicable to the analysis of claims of unlawful retaliation, **Ellis and Brunswick Corp.**, 31 Ill. HRC Rep. 325 (1987). A Complainant may establish a prima facie case of unlawful retaliation by showing that: (1) she engaged in a protected activity that was known by the alleged retaliator; (2) the respondent subsequently took some adverse action against the complainant; and (3) there is a causal connection between the protected activity and the disadvantageous employment action. **Pace and State of Illinois, Department of Transportation**, \_\_ Ill. HRC Rep. \_\_ (1989SF0588, February 27, 1995).

It is necessary to establish that the Respondent knew that Complainant had participated in a protected activity in order to establish a prima facie case of retaliation., **Westfield and Illinois Department of Labor**, 40 Ill. HRC Rep. 395 (1988) and **Darnell and State of Illinois Department of Personnel**, 6 Ill HRC Rep. 75 (1982). In **Darnell**, the

Commission determined that the failure to establish any notice on the part of the decision-maker precludes the establishment of a prima facie case of retaliation and excuses any requirement that the employer articulate a legitimate reason for its conduct.

#### Complainant's prima facie case

Complainant adequately established that she engaged in a protected activity-- that of informing Respondent of the sexually harassing behavior. Complainant next argues that she was subjected to an adverse employment action when she was fired by Abel. Complainant argues that after she reported the unwelcome conduct to Abel, Abel told her that he could not deny Martin's entrance into the restaurant, that there was nothing he could do about his brother's unwelcome conduct, that if she felt uncomfortable she should leave his employ and "that there was nothing he could do about this situation." Further, when Respondent refused to speak to Complainant by telephone when she contacted him three days later, Complainant inferred Respondent's actions to mean that her employment had been terminated.

Respondent disputes Complainant's version of his reaction following Complainant's harassment report. Abel testified that, after Complainant reported Martin and Ezekiel's conduct to him, he became very disgusted and asked Complainant if she would repeat these accusations in front of Martin and Ezekiel and Complainant refused to do so. The following day, he confronted Martin and Ezekiel with Complainant's accusations and both of them denied the accusations. Respondent maintains he did not terminate Complainant and that Complainant voluntarily never returned to the job.

Abel's version of his post-report actions is more credible in light of Complainant's own testimony that she telephoned Respondent the following Sunday "to find out what solution he had found for me as to the job."

Complainant's action of telephoning Abel three days later to determine what action he had taken indicates that she did not believe Respondent had fired her the night she reported the unwelcome conduct to him. Complainant's action indicates that she believed Respondent to be pursuing a solution to her accusations. Because Complainant believed that a solution was being pursued supports that Respondent had indicated to her that he would pursue solutions. If Respondent had actually told Complainant that "there was nothing he could do about this situation," that he could not prevent his brother from coming into the restaurant and that she should consider not coming back to work if she felt uncomfortable, there would have been no reason for Complainant to call the following Sunday to find out what "solution" Respondent had developed as Respondent's reaction, in accordance with Complainant's testimony, had clearly indicated that his only solution was for her to either put up with his brother's conduct or quit.

Further, when Complainant telephoned Abel three days later, Complainant's own testimony is that she called from a public telephone just three blocks away from the restaurant, but did not visit the restaurant. She personally spoke with Abel and he told her that he was very busy and could not speak with her then. Complainant testified that this

response indicated to her that she was not to return to work because her expectation was that Abel would have telephoned her later had he wanted her to return to work. Complainant admits that she did not call Abel back and did not subsequently return to work or go to the restaurant to speak to Abel.

The weight of evidence supports that Abel did not terminate Complainant's employment when she informed him of Martin's and Ezekiel's unwanted conduct. Instead, Abel asked Complainant to come to the restaurant to make the accusations in front of the harassers and, when Complainant refused, Respondent confronted the harassers himself. After they both denied the accusations, Respondent could take no further steps because Complainant did not return to work or otherwise appear at the restaurant to speak with Abel about the situation.

Further, it is unreasonable and baseless for Complainant to infer that Respondent had not taken any steps to alleviate the harassment simply because Respondent was busy working and could not speak with Complainant when she telephoned him at work the following Sunday.

Accordingly, I find that Respondent did not terminate Complainant's employment and, therefore, Complainant was not retaliated against by Respondent.

### **RECOMMENDATION**

Therefore, I recommend that this Complaint be dismissed with prejudice.

### **HUMAN RIGHTS COMMISSION**

By: \_\_\_\_\_  
**SABRINA M. PATCH**  
**Administrative Law Judge**  
**Administrative Law Section**

**ENTERED: December \*\*\*\*\*, 2002**